



The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM
FOR SUSTAINABLE DEVELOPMENT



**International Regulatory Co-operation:
The Menu of Approaches**

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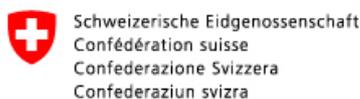
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ABSTRACT

The world has never been more interconnected, but different country-specific norms and rules apply in different parts of the world. Sometimes, it is for good reasons—specific rules and norms cater for specific preferences or have historical roots and would bring little benefits to change. But sometimes divergences threaten coordinated policy action, hamper interoperability, and raise unnecessary costs for businesses and citizens. The Organisation for Economic Co-operation and Development (OECD) (2013) notes the increased internationalisation of regulation through a wide variety of international regulatory cooperation (IRC) mechanisms. Governments use and combine a broad range of formal and informal, broad and specific mechanisms to achieve their co-operation objectives. As a result, countries are embedded in webs of regulatory co-operation that go beyond the traditional treaty-based model of international relations. This note discusses the different forms of IRC, and current knowledge about their respective benefits and challenges based on the OECD (2013).

The OECD (2013) identifies 11 different categories of mechanisms in support of IRC. These categories can be organised from the most formal and comprehensive to the least formal. The evidence suggests that countries combine several instruments in a given area to achieve their IRC objectives, and that these mechanisms may overlap in their features or form continuums. However, it is useful to define them as clearly as possible to understand the range of possibilities for countries wishing to implement IRC and to start gathering evidence on their respective benefits and costs to inform decision-making.

There is a paucity of evidence on which IRC approaches work best in different country and sector contexts. Decision-making in this area remains largely driven by political considerations and path dependency. In particular, there is no clear understanding of the benefits, costs, and success factors of diverse IRC options. Having said this, the anecdotal evidence shows that the benefits from IRC can be high. They include increased trade and investment flows and additional gross domestic product (GDP) points; administrative efficiency gains and cost savings for government, business, and citizens; and important societal benefits such as improved safety and strengthened environmental sustainability. To summarise knowledge to date, the OECD (2013) proposes a classification of the benefits, costs, and challenges of IRC, and a list of factors of success. Based on this classification, it identifies a number of advantages and disadvantages of various IRC mechanisms. More work is under way at the OECD to analyse more systematically and with a greater level of details when and under which conditions mechanisms such as various provisions in trade agreements, mutual recognition agreements (MRAs), international organisations, and good regulatory practices may help achieve regulatory cooperation objectives. Building on knowledge to date and the evidence gathered around the typology of 11 mechanisms, the OECD (2013) highlights a number of critical elements or considerations for government to ensure the success of IRC.

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LIST OF ABBREVIATIONS

ANZTPA	Australia New Zealand Therapeutic Products Agency
EU	European Union
FSANZ	Food Standards Australia and New Zealand
ILO	International Labour Organization
IRC	international regulatory cooperation
ISO	International Standards Organization
MRAs	mutual recognition agreements
OECD	Organisation for Economic Co-operation and Development
RTAs	regional trade agreements
TBT	Technical Barriers to Trade
TPR	transnational private regulation
US	United States
WTO	World Trade Organization

INTRODUCTION

The world has never been more interconnected. This is made clear through ever growing international trade and investment flows, the movements of people, the economic activity of multinationals, and the internationalisation of research and development and its diffusion. However, the world is still not “flat.” Different country-specific norms and rules apply in different parts of the world. Sometimes, it is for good reasons—specific rules and norms cater for specific preferences or have historical roots and would bring little benefits to change. But sometimes divergences threaten coordinated policy action, hamper interoperability, and raise unnecessary costs for businesses and citizens.

Against this background, the Organisation for Economic Co-operation and Development (OECD) (2013) notes the increased internationalisation of regulation through a wide variety of international regulatory cooperation (IRC) mechanisms. Governments use and combine a broad range of formal and informal, broad and specific mechanisms to achieve their co-operation objectives. As a result, countries are embedded in webs of regulatory cooperation that go beyond the traditional treaty-based model of international relations.

Despite growing IRC, the barriers to cooperation remain important—ranging from concerns regarding the sovereignty of nations, legal and other obstacles to information exchange, entrenched regulatory and administrative cultures, and various frictions on technical aspects. Decision-making on IRC is not informed by a clear understanding of the benefits, costs, and success factors of diverse IRC options.

The OECD has begun identifying the different forms of IRC and their relative merits and challenges. However, more could be done to collect evidence on the use of different IRC mechanisms, on their benefits, costs, and challenges in specific sectors and situations, and to strengthen IRC following good regulatory policy principles.

This note discusses the different forms of IRC, and current knowledge about their respective benefits and challenges based on the OECD (2013). Another OECD note explores the trade effect of IRC (“International Regulatory Co-operation, a Trade-Facilitating Mechanism” by Frank van Tongeren, Véronique Bastien and Martin von Lampe).

THE MENU OF APPROACHES: THE OECD TYPOLOGY OF INTERNATIONAL REGULATORY COOPERATION

With the progressive emergence of an open, dynamic, and globalised economy, the internationalisation of rules has become a critical issue for a variety of reasons, including but not limited to trade facilitation (Figure 1). Governments increasingly seek to maximise the benefits of globalisation for national populations by eliminating unnecessary regulatory divergences and barriers, and ensuring greater co-ordination

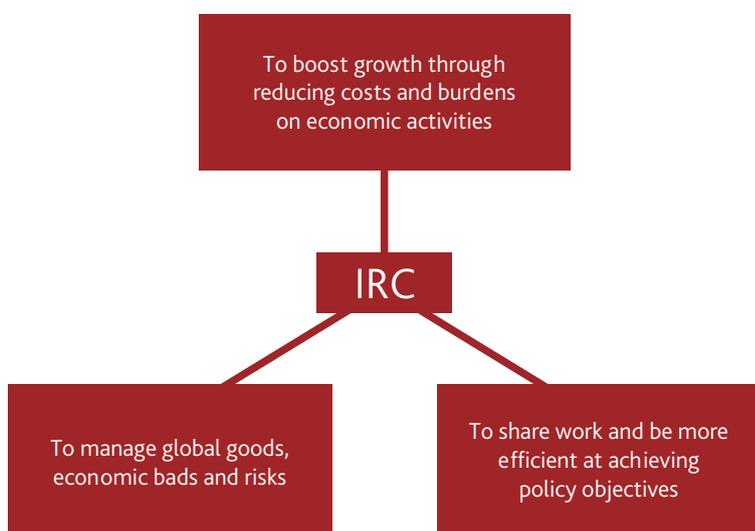


FIGURE 1:

The Drivers of International Regulatory Co-operation

Source: Authors

of regulatory objectives. At the same time, intensification of global challenges, such as those pertaining to systemic risks (financial markets), the environment (air or water pollution), and human health and safety, is leading to growing regulatory co-operation efforts as a key component of risk management strategies across borders.

Against this background and through an extensive collection of evidence and a survey of OECD countries, the OECD (2013) identifies 11 different categories of mechanisms in support of IRC. These categories can be organised from the most formal and comprehensive to the least formal (Figure 2). The evidence suggests that countries combine several instruments in a given area to achieve their IRC objectives, and that these mechanisms may overlap in their features or form continuums. However, it is useful to define them as clearly as possible to understand the range of possibilities for countries wishing to implement IRC and to start gathering evidence on their respective benefits and costs to inform decision-making.

With integration/harmonisation through supranational or joint institutions, national regulatory competences leave way to supranational law making and institutions. Regulatory co-operation takes place primarily through harmonisation of rules. The emblematic example of this most extreme form of IRC is European Union (EU) institutions and directives. Other more focused examples include the joint Food Standards Australia and New Zealand (FSANZ) and the Australia New Zealand Therapeutic Products Agency (ANZTPA).

Specific negotiated agreements are formal forms of regulatory co-operation signed by states and binding at

international law, whereby each participating government agrees details of regulatory requirements, legal obligations and responsibilities on a specific topic/area. These include treaties, conventions, and protocols. These agreements may be multilateral such as the Montreal protocol or bilateral such as a number of tax and investment treaties.

Regulatory partnerships between countries are formal, umbrella-type, broad political agreements that they will co-operate to promote better quality regulation and minimise unnecessary regulatory divergences. Examples include the Canada-United States (US) Regulatory Cooperation Council, the Mexico-US High-Level Regulatory Cooperation Council, and the Trans-Tasman Cooperation.

Inter-governmental organisations provide countries with fora to promote regulatory co-operation. As illustrated in OECD (2014), they offer platforms for continuous dialogue and the development of common standards, best practices, and guidance. Beyond standard setting, they facilitate comparability of approaches and practices, consistent application, and capacity building in countries with a less developed regulatory culture. On an average, countries are members of some 50 international organisations. Examples include the International Labour Organization (ILO), the OECD, and the World Trade Organization (WTO), among others.

Regional trade agreements (RTAs) with regulatory provisions offer formal agreements aimed at facilitating economic and trade integration. RTAs are growing IRC instruments, as they increasingly involve provisions related to competition, domestic regulation, technical standards, or transparency of

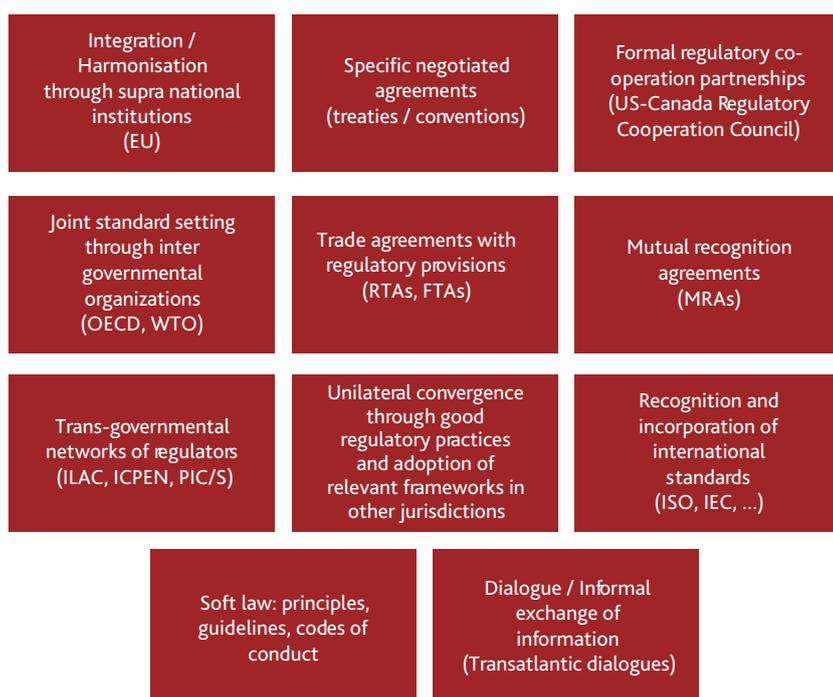


FIGURE 2:

The Continuum of IRC Arrangements, From Most to Least Legally Binding

Source: OECD (2013).

rules. According to the WTO database of RTAs, of the 336 or so RTAs listed in 2013, 61 explicitly covered the topic of domestic regulation, 100 had competition provisions, and 99 included provisions on technical regulations, standards, and technical barriers to trade.

With Mutual Recognition Agreements (MRAs), parties to the agreement recognise and uphold legal decisions taken by competent authorities in another member. In general, no regulatory convergence is implied by an MRA, that is, there is no implication that the regulations are to be brought into alignment at any stage. Three types of MRAs can be distinguished depending on the regulatory function under co-operation—i) mutual recognition of standards; ii) mutual recognition of compliance techniques (where certification by one party is recognised as equivalent to certification by another party); and iii) mutual recognition in relation to enforcement (when judgements and arbitral awards are the subject of the MRAs).

With trans-governmental networks, co-operation is based on loosely structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. It involves specialised domestic officials (typically regulators) directly interacting with each other (through structured dialogues or memoranda of understanding), often with minimal supervision by foreign ministries. Examples include the International Competition Network and the Basel Committee on Banking Supervision, among others.

Formal requirements to consider IRC when developing regulations involve unilateral recognition and good regulatory practices. The 2012 OECD Recommendation of the Council on Regulatory Policy and Governance recommends that members “in developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.” Ex ante consideration of regulatory co-operation provides a powerful way to prevent the development of future incompatibilities. In this respect, good regulatory practices such as those recommended in the 2012 Recommendation (through stakeholder engagement and regulatory impact assessment, for instance) are proving important instruments to eliminate unnecessary regulation and allow the impacts on other jurisdictions to inform the regulatory process.

Incorporation of international standards in legislative instruments can be done through reference to one or more standards, or the replacement of the entire text in the drafting of a code or regulation. Recognition and incorporation of international standards support regulatory alignment in sectors where trade is important by allowing harmonisation of technical specifications of products. Its use has been boosted by the 1994 WTO Agreement on Technical Barriers to Trade (TBT). Examples include references to/or adoption of text from International Standards Organization (ISO) standards and other international standard-setting bodies.

Soft law promotes co-operation based on instruments that are not legally binding, or whose binding force is somewhat “weaker” than that of traditional law, such as codes of conduct, guidelines, roadmaps, peer reviews, and so on. Most international organisations use soft law in combination with legally binding instruments. An example is provided by the OECD set of Guidelines and Principles, combined with peer review mechanisms (OECD 2014).

Dialogue/informal exchange of information, by which regulators and various stakeholders from different jurisdictions meet to exchange views on regulatory issues, can help initiate co-operation in sectors where there is little common ground for co-operation (including no common language on issues to be addressed). It is difficult to track and monitor this specific mode of co-operation because, by definition, informal exchange of information does not necessarily require a formal setting to take place. However, the transatlantic dialogues instituted by the EU and the US through the Transatlantic Economic Council provide examples.

WHAT WORKS AND WHAT DOES NOT: IDENTIFYING THE BENEFITS, COSTS, CHALLENGES AND FACTORS OF SUCCESS OF DIFFERENT APPROACHES TO IRC

There is a paucity of evidence on which IRC approaches work best in different country and sector contexts. Decision-making in this area remains largely driven by political considerations and path dependency. In particular, there is no clear understanding of the benefits, costs, and success factors of diverse IRC options. Most information in this regard is anecdotal, not granular enough or purely qualitative. Having said this, the anecdotal evidence shows that the benefits from IRC can be high. They include increased trade and investment flows and additional gross domestic product (GDP) points (Ecorys 2009); administrative efficiency gains and cost savings for government, business, and citizens; and important societal benefits such as

improved safety (see OECD 2010 on chemical safety) and strengthened environmental sustainability. To summarise knowledge to date, the OECD (2013) proposes a classification of the benefits, costs, and challenges of IRC, and a list of factors of success.

HOW TO CLASSIFY COSTS AND BENEFITS OF IRC

The OECD (2013) provides a definition of the benefits, costs, and challenges summarised in Figure 3. Benefits include economic gains obtained through reduced transaction costs, increased trade and investment flows; a better management of global goods and bads, which by nature defy borders; the administrative gains reaped through work sharing and greater transparency; and greater flow of good regulatory practices. Costs and challenges include the costs associated with maintaining the cooperation infrastructure; the differences in regulatory procedures and legal systems across countries that may complicate efforts to overcome regulatory divergences; the complex political economy of regulatory cooperation, involving a difficulty in reaching compromises, sharing gains and costs, and fighting specific interests; and the limited implementation, enforcement and effectiveness of some cooperation mechanisms.

Based on this classification, the OECD (2013) identifies a number of advantages and disadvantages of various IRC mechanisms. This analysis is summarised in Table 1. More work is under way at the OECD to analyse more systematically and with a greater level of details when and under which conditions mechanisms such as various provisions in trade agreements, MRAs, international organisations, and good regulatory practices may help achieve regulatory cooperation objectives.

TAKING INTO ACCOUNT THE SUCCESS FACTORS OF IRC

The OECD (2013) points to that the success of IRC is a combination of several elements. Some areas lend themselves more easily to co-operation than others and present important IRC opportunities. The proximity of regulatory set ups, issues, objectives, and preferences between countries is a key determinant of success. The design of the co-operation itself and the process through which it is developed will have an important role in determining its success.

Hoekman and Mavroidis (2015) classify countries in four groups to refine the understanding of regulatory coordination. In addition, the following factors may be expected to have an impact on the outcomes of regulatory cooperation.

- The physical proximity of countries—currently prominent zones of regulatory cooperation enjoy a strong element of proximity, including the EU, the Trans-Tasman cooperation, the Canada-US regulatory cooperation.
- The “like-mindedness” across countries—beyond physical proximity, the OECD (1994) identifies the factors important in determining the opportunity for cooperation. They are the extent to which regulatory problems are similar; the extent to which governments share the same regulatory objectives in a given field and have similar standards for determining whether those objectives have been met; and the extent to which social, economic and political—as well as technological—conditions are similar.

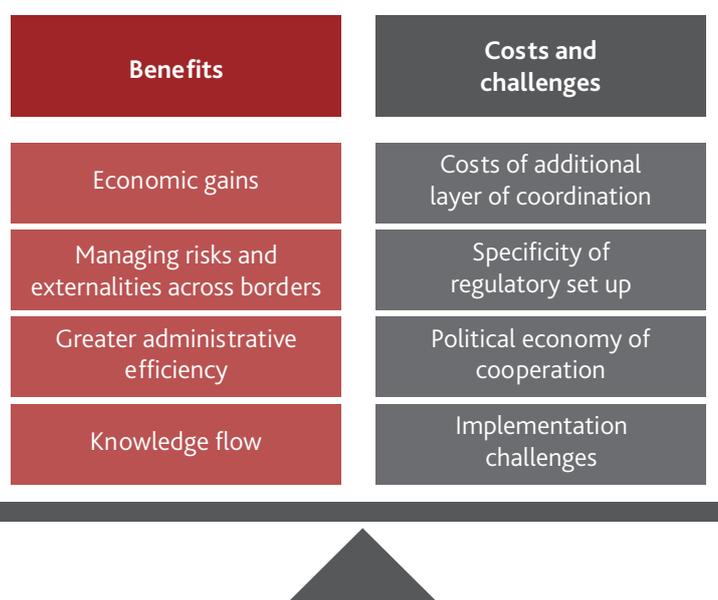


FIGURE 3:

The Benefits, Costs and Challenges of Various IRC Mechanisms

Source: OECD (2013).

- The size and power of the cooperating countries—the dynamics will deeply differ depending on whether the countries are of the same or of different sizes/powers. Cooperation may be easier to achieve in asymmetrical cases—where there is an obvious regulation maker and a regulation taker—than in symmetrical cases where both partners may pretend to impose their approaches.

Building on knowledge to date and the evidence gathered around the typology of 11 mechanisms, the OECD (2013) highlights a number of critical elements or considerations for government to ensure the success of IRC. They are summarised in Box 1 and further defined and illustrated in OECD (2013).

TABLE 1:

Mapping IRC Mechanisms and their Advantages/Disadvantages
Building on Available Evidence

Source: OECD (2013).

Type of mechanism	Advantages	Disadvantages
Integration/harmonisation	<p>The rules are the same for all.</p> <p>Compliance is the greatest.</p> <p>Supranational modes of governance are less likely to regulatory capture than networked forms.</p>	<p>Long process.</p> <p>Costs of the structure and of enforcement.</p> <p>Extensive delegation may be perceived as threatening the popular legitimacy of the mechanism.</p>
Regulatory partnerships between countries	<p>High-level engagement provides a strong signal that supports greater co-operation at lower levels (between regulators).</p> <p>Evidence that such partnerships avoid race to the bottom type of effects.</p> <p>Co-operative agreement that provides a flexible mechanism to address necessary evolution in the partnership.</p>	<p>The federal-only nature of the regulatory initiatives may generate difficulty to address regulations at different levels of jurisdiction.</p>
Intergovernmental organisations	<p>Provide platforms to promote continuous dialogue and anticipate emerging issues.</p> <p>Laboratory of co-operation experiments, laying the groundwork for broader and legally binding international agreements.</p>	<p>May be perceived as talk shops where progress is slow to materialise.</p> <p>Weaknesses in enforcement and compliance.</p>
Regional agreements with regulatory provisions	<p>Legal force and direct connection to trade and economic integration.</p> <p>Regional agreements offer deeper levels of integration and a higher degree of co-operation than bilateral agreements. They offer economies of scale in enforcement.</p>	<p>May lead to a proliferation of provisions with limited consistency.</p>
Areaspecific legally binding agreements	<p>Legal force</p>	<p>Lack of enforcement in some cases.</p> <p>Bilateral agreements may not be sufficient to ensure proper co-operation where multilateral co-ordination is needed (tax matters).</p>

TABLE 1 CONTINUED

Type of mechanism	Advantages	Disadvantages
Mutual recognition agreements (MRAs)	<p>Preserve state sovereignty in rule-making and induces minimal adjustment costs.</p> <p>Reduce duplication efforts.</p> <p>May constitute a useful precursor to harmonisation.</p>	<p>The time and cost required to negotiate MRAs can be high.</p> <p>MRAs require broadly similar regimes and extensive trust between parties and discussions every time changes occur in regulations in one of the co-operating parties.</p> <p>Lack of enforcement (some MRAs between the EU and the US are not enforced).</p> <p>Robust mechanisms need to be established and maintained to deal with disputes.</p>
Transgovernmental networks	<p>Low-cost, flexible and adaptable/scalable structures, which foster experimentation and innovation.</p> <p>Network regulation supports trust building, technical approaches, and may help avoid race to the bottom issues.</p>	<p>Enforcement and monitoring may be limited owing to a lack of legal basis—mainly based on reputational aspects.</p> <p>The informal nature of regulatory networks is likely to mask unequal power relationships and may strengthen the already powerful regulatory powers.</p> <p>May facilitate exclusion and make monitoring and participation by other officials and non-state actors difficult.</p> <p>Technocratic governance risks supporting the development of a regime with little or no public check on administrative action.</p>
Transnational private regulation (TPR)	<p>International standardisation can lead to standards and references that are globally accepted by all stakeholders.</p> <p>Enforcement based on contracts and market/reputation pressure is effective in global value chains that extend to countries in which the rule of law is not entirely complied with.</p> <p>Allow heavy reliance on private expertise, which is relevant in markets where the pace of technological change is fast and highly technical information is needed for the definition of implementing measures and technical specifications; and private actors are the most informed parties or the best positioned players to solve a given failure.</p>	<p>Proliferation and fragmentation of private schemes (despite the consolidation under way).</p> <p>The standardisation process tends to be slow and to enshrine existing technical practice.</p> <p>Uncertainty on the performance of TPR and on the conditions under which private schemes can constitute a suitable solution to achieve public goals.</p> <p>Lack of accountability mechanisms and under use by TPR of better regulation instruments. In some instances, TPR schemes may fail to achieve comprehensiveness and become clubs of specific interests.</p>
Soft law: guidelines, peer review mechanisms	<p>Flexible tools that can be adapted easily to new and emerging areas/issues.</p>	<p>Compliance and enforcement may be difficult. Countries may feel free to adopt parts of internationally agreed standards and ignore others.</p>

TABLE 1 CONTINUED

Type of mechanism	Advantages	Disadvantages
Informal exchange of information	<p>Low-cost mode of IRC, allowing the sharing of practices and to establish common understanding and language on issues.</p> <p>It can help build trust among regulators and provides early warning systems. It fosters regulatory transparency and may help reduce compliance and administrative costs.</p> <p>It is especially effective at bringing regulators together in new fields of regulation where common terminology and approaches need building from the onset.</p>	<p>There is a risk that the co-operation never becomes operational and remains a high-level discussion. The lack of implementation and compliance mechanisms may make this co-operation slow moving and frustrated parties may drop out.</p>

BOX 1:

Considerations for Government to Ensure Successful IRC

1. Ensure high-level political commitment to provide for leadership and oversight.
2. Embed IRC in regulatory processes (in particular, regulatory impact assessment, ex-post evaluation, and stakeholder engagement).
3. Establish appropriate consultation mechanisms.
4. Build trust among regulators.
5. Promote common language, baseline—through taxonomy, classifications.
6. Overcome constraints to the exchange of information and promote it.
7. Ensure compliance with IRC mechanisms.
8. Share costs and benefits.
9. Evaluate regularly the impacts of IRC.
10. Incorporate flexibility mechanisms to adapt to changing market structure and new issues.

Source: OECD (2013).

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